

# NORTH ATLANTIC COOPERATION AND DEMOCRATIZING GLOBALISM

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## I. A Constitution for the World Economy?

### A. Globalization as a Political Project

Since the mid-1990s, a number of factors and events have focused public concern on the effects and implications of the current phase of globalization. The series of financial crises which reversed the rapid growth of many of the Asian countries, devastated Russia, and hit Brazil gave a menacing reminder of the fragility of an open and under-regulated world economy. Although leaders and decision-makers have generally remained convinced of the need to continue to pursue the neo-liberal mission of removal of all national barriers to market access for goods, services and capital, there has been a greater emphasis on the phasing of liberalization, and the need for it to be accompanied by improvements both in national state regulation and global governance.<sup>1</sup> The World Trade Organization (WTO), the main institutional embodiment of the neo-liberal vision of the world economy, became the focus of controversy and criticism, as the decisions of its panels continued to prioritize global free trade over local concerns as diverse as those of Caribbean smallholder banana producers, European beef consumers, American environmentalists, and Canadian magazine readers. Following the failure of his attempt to secure fast-track negotiating approval from the Congress in November 1997, President Clinton attempted to appease some of the domestic critics in his speech to the GATT 50<sup>th</sup> anniversary meeting in May 1998, by speaking of the need for the WTO to listen to ordinary citizens, consult representatives of the broad public, and bring openness and accountability to its operations. The point was driven home when the OECD states were forced first to suspend and then abandon the proposed Multilateral Agreement on Investment (MAI), after 4 years of preparation and 3 years of intensive negotiations. This was attributed, at least partly, to the failure of the negotiators to 'gain wider popular legitimacy for their actions by explaining and defending them in public', thus leaving themselves open to ambush by a coalition of 'network guerillas'.<sup>2</sup>

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I would like to thank the organisers of and participants in the conference on Transatlantic Regulatory Cooperation, especially Peter Lindseth and Anne-Marie Slaughter, for a stimulating debate; and Catherine Hoskyns, as always, for continued support and discussion, even in the Aegean.

<sup>1</sup> As to the former see the World Bank's *World Development Report. The State in a Changing World* of 1997; and for the latter, the report of the Commission on Global Governance *Our Global Neighbourhood* (Oxford, OUP, 1995). See also Joseph Stiglitz, 'More Instruments and Broader Goals: Moving Towards the Post-Washington Consensus', 1998 WIDER Lecture (UN University-World Institute for Development Economics Research, Helsinki).

<sup>2</sup> Guy De Jonquières, 'Network Guerillas', *The Financial Times*, 30 March 1998; see also Nick Mabey, 'Defending the Legacy of Rio: the Civil Society Campaign against the MAI', in Sol Picciotto and Ruth Mayne (eds.), *Regulating International Business. Beyond Liberalization* (Basingstoke, Macmillan, 1999).

In the midst of these events, a number of news sources quoted Renato Ruggiero, the WTO's Director-General, as saying 'We are writing the constitution of the new global economy'. This quote was taken up and cited by critics of the MAI negotiations, who argued that an excessively pro-business structure was being constructed, largely in secret. Interestingly, the WTO felt the need to issue a press release correcting the story, pointing out that the MAI was being negotiated at the OECD, an entirely different organization consisting of 29 advanced economies, while 80% of the WTO's 132 members are developing countries and economies in transition.<sup>3</sup> Apparently, the report had originated in a speech given by Mr. Ruggiero on 16 January 1998 at Chatham House in London, in which he quoted Professor John Jackson as having described the multilateral trading system as a 'constitution' for the world economy.

Mr Ruggiero's primary concern was no doubt to make it clear that the WTO was not responsible for the MAI. However, this was not what those citing the remark were suggesting, since one of the main criticisms of the MAI was precisely that it should not be negotiated at the OECD but in a more inclusive forum such as the WTO. The thrust of the criticism was rather at the lack of openness and accountability of both the negotiations and the structures envisaged for such important international economic institutions.

Indeed, it could be said that a 'constitution for the world economy' is precisely what we should be thinking about. This does not mean that there is either a unified world economy or an emerging global government. However, it does seem clear that the patterns of global socio-economic integration which have developed in the past quarter-century have also entailed major changes in the role and interactions of political structures and processes of accountability and legitimation, both within and between states. These changes have been inadequately considered in the debates around the misleading concept of 'globalization', which create an unhelpful polarity between views that the nation-state is dead or still very much alive. A different approach would consider the implications of these changes for the form and functions of statehood, or more generally for the institutions and structures of the public sphere. In this chapter I will sketch out what I consider these changes to have been, in order to put forward some suggestions which could help to remedy the 'democratic deficit' of the new global public sphere.

## B. The Special Responsibilities of the US and the EU

Clearly, the US and the EU can and must make a crucial contribution to the process of constitution-building for the world economy. As other chapters in this book spell out in

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<sup>3</sup> WTO, PRESS/91, 17 February 1998. It added that 'There is no negotiation currently underway in the WTO which focuses on investment.' While this was strictly correct, it was well-known that many OECD states had pressed for such a negotiation at the WTO; their intention was to persuade developing countries to join the MAI, which was billed as a 'free-standing' treaty, and several non-OECD members were admitted to the MAI negotiations. Indeed, following the collapse of the MAI negotiations several of the main participants, notably the European Commission and Japan, quickly began to press for the inclusion of investment in the next WTO negotiating round, based on a slightly modified version of the MAI, and building on the 'educative' work of the WTO's Working Group on Trade and Investment. Despite the WTO press release, the *Christian Science Monitor* of 25<sup>th</sup> February 1998 was still citing Ruggiero as saying that the MAI would be 'the constitution for a single global economy'.

detail, North Atlantic business and trading interests play a preponderant role in the world economy. Their political weight is perhaps even more significant, as was dramatically shown by the NATO action on Kosovo. Yet, as that action also demonstrated, it is crucial their leadership should be exercised in a way that is sensitive to the concerns of the whole of the world community. While disagreements between these two powerful entities can greatly hinder the work of international organizations, their unity can pose an even greater threat if it disregards or overrides the views of others in the South and East.

Both also have much to contribute from their own history and experience to the design of democratic political institutions for the regulation of corporate capitalism: the US as a complex federal system with powerful public regulatory agencies and underpinned by a strong rule of law; and the EU as the pioneer of a new form of still evolutionary confederation. Yet both must also beware of seeking to impose their own model or perspectives inappropriately on others. Even more importantly, both need to find new ways of accommodating internal demands for accountability in relation to increasingly complex international institutional involvements. Devices such as Fast Track negotiating authority, and the EU's 'article 113 Committee' no longer respond adequately to the need for public consultations on the wide range of international negotiations and procedures involving public bodies, which have often extensive internal repercussions.<sup>4</sup> At the same time, internal political demands can put great strain on international relationships: as evidenced, for example, by the difficulties faced by the EU in devising a banana import regime which could satisfy its various internal political constituencies while remaining compatible with its international obligations and pressures.

### C. Liberalization and Democratization

The past quarter-century has seen an increasing process of economic liberalization - the removal of barriers both between and within states to the flows of goods, capital, and labour. Economic liberalization has also been commonly assumed to be linked to political

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<sup>4</sup> Under the US constitution, treaties require the 'advice and consent' of the Senate, by a two-thirds majority. However, it has become accepted that some international agreements may be treated as 'executive agreements' and exempt from the need for this approval (the US signed the original GATT on this basis). Nevertheless, any agreement which requires changes to domestic law will need to be acceptable to both Houses of the Congress. Under 'fast track', the Congress enables the Executive to enter into complex negotiations (in particular multilateral trade deals) by specifying the topics which may be covered and a deadline, and undertaking that the resulting agreement will be voted upon by both Houses on a take-it-or-leave-it basis. The EU's objective of a common commercial policy, expressed in article 113 of the Treaty of Rome, includes the negotiation of tariff and trade agreements, which the article provides should be conducted by the Commission under the authority of the Council and in consultation with a special committee appointed by the Council for this task. This is now article 133 of the Treaty of the European Community, with the addition of a new paragraph allowing the Council (acting unanimously and after consulting the Parliament) to extend such negotiations to services and intellectual property. While the commercial policy powers may be exercised by a qualified majority, the Council's residual powers to take action to achieve the objectives of the common market (article 235, now 308) require unanimous agreement. See A. Dashwood, 'External Relations Provisions of the Amsterdam Treaty.' *Common Market Law Review* 35: 1019-1045 (1998).

democratization. However, the nature of the interaction is not obvious. While political studies have found that domestic factors have had the strongest influence in democratic transitions, it is also clear that the international context plays an important part through processes of emulation and influence, in which both the EU and the USA have played major roles.<sup>5</sup> Nevertheless, as Phillippe Schmitter has pointed out, the transmission-belt for democratization has been the international communication outside government controls of images and ideas, rather than a simple causal link of economic freedom stimulating political democratization.<sup>6</sup> Indeed, external interests in opening markets and exploiting economic opportunities may entail repression of autochthonous democratic forces or their channeling towards 'western values'.<sup>7</sup>

In fact, far-reaching social changes underly the recent phase of globalization, and the transformations of the character and the inter-relationship of the political and economic, the public and private spheres. Autocratic power has been rapidly losing its ability to command automatic deference in both the family and the factory, the classroom and the boardroom. This results from widespread revolts against authoritarian domination and the power to control truth embodied in tradition, involving demands for increased personal freedom and dignity, equality (notably, between women and men), and the ending of coercion.<sup>8</sup> While undermining patriarchy and hierarchy, these anti-authoritarian movements have also paved the way to post-industrial capitalism, with its emphasis on information-management, flexible working and a global outlook.

They have also stimulated the rethinking of democratic principles and significant constitutional remodelling that have been taking place in what are thought of as the 'mature' democracies. In Britain, for example, the 'Mother of Parliaments' has transferred devolved powers to regional assemblies in Scotland and Wales, incorporated the European Convention on Human Rights into national law, and is finally to democratize its hereditary upper House and introduce freedom of information legislation. Yet even while the UK government was taking the lead in NATO military action to impose solutions to ethnic problems in the Balkans, the deep-rooted conflicts in Northern Ireland remain apparently intractable. Indeed, some political philosophers argue for a new approach to constitutionalism that can take account of the claims to recognition of multiple, overlapping and diverse cultural identities,

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<sup>5</sup> Laurence Whitehead (ed.) *The International Dimensions of Democratization. Europe and the Americas*. (Oxford, OUP, 1996).

<sup>6</sup> P. Schmitter, 'The Influence of the International Context upon the Choice of National Institutions and Policies in Neo-Democracies', in Whitehead, *International Dimensions* (ibid.) 26-54. He points out that the hypothesis that economic freedom leads to political democracy is an inversion of Kant's assumption that republics would be more likely to engage in international commerce and renounce war (Immanuel Kant, "Toward Perpetual Peace" (1795), in M. J. Gregor (trans. and ed.) *Practical Philosophy* (Cambridge, CUP, 1966) 311-351).

<sup>7</sup> A. Burgess, *Divided Europe: the New Domination of the East* (1997).

<sup>8</sup> Anthony Giddens, *Runaway World*. The Reith Lectures 1999 (from [bbc.co.uk](http://bbc.co.uk) accessed 8/5/99).

as opposed to the liberal assumption of an undifferentiated and homogenous citizenry.<sup>9</sup> These dilemmas, debates and changes in the forms of democracy are often ignored in the talk of 'transitions to democracy', which tends to assume a clear distinction between authoritarian states and those with multi-party representative democracy.

However, the over-arching challenge is to find new democratic forms matching the new, globally-integrated patterns of production and consumption. While there is much talk of the 'democratic deficit' of regional and international institutions, debate about how it might be remedied is at best half-hearted, or even sceptical.<sup>10</sup> This can be readily understood if we continue to think in terms of a simple electoral representative model of democracy. No-one seriously envisages the possibility of a global government on this pattern, and indeed the greater awareness of the importance of locality and diversity resulting from economic globalization renders it even less believable. Consequently, those who seek a foundation of legitimacy for global economic liberalization tend to resort to prescriptions for universal rights and principles of justice. However, if national governments remain the fulcrum between national and international political structures, a radical liberal vision of cosmopolitan citizenship and universal individual rights lacks any substantial democratic content.

This dilemma can be seen in much of the discussion of the prospects and proposals for 'cosmopolitan democracy'. This debate recognises that globalization, based on the neo-liberal vision of the removal of barriers and the unleashing of the forces of economic self-interest, is at best unstable if it cannot deliver social justice, and that global social justice issues must be debated and resolved within a global public sphere.<sup>11</sup> However, there is too little understanding or analysis of the nature of this global public sphere. It is frequently said to entail the emergence of some sort of global or international 'civil society'. Yet, there is considerable vagueness about who are the members of such a global civil society; and in the perspective of international relations they are seen in an undifferentiated way as 'non-state actors', as opposed to states (meaning governments) which are the 'traditional' members of international society. Certainly, the more sophisticated theorists concede that 'the spatial reach of the modern nation-state did not fix impermeable borders for other networks', and that 'political communities have rarely - if ever - existed in isolation as bounded geographical totalities, and they are better thought of as overlapping networks of interaction'.<sup>12</sup> Indeed, one can go further and point out that territorially-defined states have themselves always formed

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<sup>9</sup> James Tully *Strange Multiplicity. Constitutionalism in an Age of Diversity*. (Cambridge, Cambridge University Press, 1995).

<sup>10</sup> Thus, Robert A. Dahl argues that international organizations (including the EU) are, and can only be, bureaucratic bargaining systems among élites; this conclusion flows from his view that the problem of delegation, already great for national representative systems, becomes insuperable for international politics: 'Can International Organizations be Democratic? A Skeptic's View', in Ian Shapiro and Casiano Hacker-Cordón, *Democracy's Edges* (Cambridge University Press, 1999) 19-36.

<sup>11</sup> Richard Devetak and Richard Higgott, 'Justice Unbound? Globalization, States and the Transformation of the Social Bond.' *International Affairs* (1999) 75, 483-498.

<sup>12</sup> David Held *Democracy and the Global Order. From the Modern State to Cosmopolitan Governance* (Cambridge, Polity Press, 1995) 225.

overlapping and interlocking spheres, as the exercise of state powers was mediated through the flexible concept of jurisdiction. Thus, the classical liberal international state system of Kant and Smith was already composed of interdependent states, and the growth of corporate industrial capitalism has since the second half of the 19<sup>th</sup> century depended on international arrangements, many of which (such as the system of intellectual property) resulted from debates and pressures of 'international civil society'.<sup>13</sup>

Hence, the problem of globalization does not simply result from 'disjunctures' between nationally-organised political systems and increasingly globally-oriented economic activity, or even power structures. It stems from changes in the form and functions of the state itself, as well as its international structures, resulting from the dynamic of socio-economic relations. What globalization means, and the shape it might take, are as much political as economic questions. A new global public sphere has been under construction for some time, but it has come from the policies and decisions of international elites. The question now is whether and how it can be democratized.

## II Global Governance Networks

### A. The Fragmentation of the Public Sphere

Consideration of appropriate democratic principles and institutions for the the global public sphere should be based on analysis of its particular character, rather than an extrapolation of inappropriate and in many ways dated national models of majoritarian representative democracy. A good starting-point is provided by the buzzword 'global governance'. This seems to have been introduced into the parlance of the so-called Washington consensus by World Bank officials, constrained by its constitution from intervening in the domestic political affairs of states, who found 'governance' a useful euphemism in raising issues such as corruption.<sup>14</sup> However, it also reflected a technicist view of social management which had a wider resonance. Thus, among some theorists of political science and public administration it has been used to analyse changing patterns of state-market coordination, resulting from failures of government or political control and responding to social complexity, which can be more decentralized and interactive.<sup>15</sup> In this sense it paralleled the concept of 'regulation',

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<sup>13</sup> For a more detailed analysis, see S. Picciotto, 'The Regulatory Criss-Cross: Interaction between Jurisdictions and the Construction of Global Regulatory Networks', in W. Bratton, J. McCahery, S. Picciotto and C. Scott (eds.) *International Regulatory Competition and Coordination* (Clarendon Press, Oxford, 1996) 89; and C. N. Murphy *International Organization and Industrial Change. Global Governance since 1850* (Cambridge, Polity Press, 1994).

<sup>14</sup> Yves Dezalay and Bryant Garth, *The Internationalization of Palace Wars* (Chicago, Chicago U.P., forthcoming), ch.11. The World Bank was also influenced to take greater account of the role of the state by the success of the East Asian 'developmental states': R. Wade (1996) 'Japan, The World Bank, and the Art of Paradigm Maintenance: *The East Asian Miracle* in Political Perspective.' *New Left Review* No. 217: 3-36.

<sup>15</sup> See Jan Kooiman *Modern Governance. New Government-Society Interactions* (London, Sage Publications, 1993). Renate Mayntz, from a systems-theory perspective, traces the term back to German debates on 'soziale Steuerung', used as an equivalent for the Parsonian concept of control (as in control hierarchy); however, this obscured the distinction between

which has also come to be used either in a general sense of the capacity of the social system to adapt and stabilize in response to politico-economic dynamics (as in the French 'regulation school'), or more particularly to refer to explicit, legally formalized mechanisms for directing or supervising market-based activities.

The use of these terms is both descriptive and normative. They reflect real historical developments, with the transformation of large-scale industrial production and of centralized planning systems (both state and corporate), leading to the emergence of more flexible and interactive modes of production and distribution based on electronic technologies, as well as the major changes in money and finance involving new forms of market intermediation of savings and investment. At the same time these concepts are often used to legitimize the increasingly important role of a variety of professionals operating in the increasingly large interface between the state, which has been substantially 'privatized', and the market, which is dominated by corporate networks. Not surprisingly, each group tends to give its own ideological spin to the terms: policy-makers and lawyers advocate deliberately-designed governing mechanisms and formalized regulation, while economists emphasize the self-governing capacities of market-based systems.

Thus, an important aspect of globalization has been a process of fragmentation of the public sphere, reflecting shifts in the character and relationships of private and public institutions, and resulting in systems of layered governance based on regulation.<sup>16</sup> A number of writers have described this in terms of the emergence of regulatory webs or networks, although their analyses of the phenomenon and its implications differ in various ways. Notably, Anne-Marie Slaughter<sup>17</sup> refers to the 'disaggregation' of the state, and the development of international regulatory cooperation through inter-governmental networks. John Braithwaite and Peter Drahos have conducted an impressive survey and analysis of the role of global regulatory webs in the globalization of business.<sup>18</sup> Giandomenico Majone also points to the growing phenomenon of delegation of public functions or powers to specialist and often technical bodies, and sees EU agencies in practice as transnational regulatory networks.<sup>19</sup> More

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governing (the intentional application of measures to achieve goals) and governance (which recognises that social subsystems have autonomous capacities to develop and will react and adapt to governing measures): R. Mayntz, 'Governing Failures and the Problem of Governability: Some Comments on a Theoretical Paradigm', in Kooiman, *Modern Governance*, 9 (translated and revised from an article published in German in 1987).

<sup>16</sup> Organization for Economic Cooperation and Development, *Regulatory Cooperation for an Interdependent World* (Paris, OECD, 1994). See also S. Picciotto, 'Networks in International Economic Integration: Fragmented States and the Dilemmas of Neo-Liberalism', *Northwestern Journal of International Economic Law* 17, 1014 (1996/7).

<sup>17</sup> A.-M. Slaughter, 'The Real New World Order.' *Foreign Affairs* 76, (1997) 183-197, and see also her chapter in this volume.

<sup>18</sup> John Braithwaite and Peter Drahos, *Global Business Regulation* (Cambridge, Cambridge University Press, forthcoming).

<sup>19</sup> G. Majone (ed.) *Regulating Europe. European Public Policy*. (London, Routledge, 1996). Equally, US lawyers such as Alfred Aman, have pointed out how domestic regulatory reforms have facilitated the globalization of markets, but that they require a new approach

fundamentally, Manuel Castells in his monumental 3-volume account of what he describes as *The Information Age* considers that networks are the prime characteristic of the emerging social structures, and also describes the EU as the Network State.<sup>20</sup>

Despite some differences in their analyses, each of these writers also recognizes that this process entails a rethinking of accountability or legitimacy. In the remainder of this chapter I will explore some of the proposed legitimation or democratization arrangements, grouped around two models.

## B. The Kantian Model and Epistemic Communities

Some see no need to revise the dominant existing model of representative democracy based on the nation-state, but would seek to ensure its adoption in all states, which should be bound together within a strong framework of international law and institutions embodying individual human rights. In this perspective 'equal rights of the citizens may offer the most effective strategy for compensating the "democratic deficit" of international organizations'.<sup>21</sup> This would actualize Kant's vision of 'Perpetual Peace', based on a confederation or League of republican states which would renounce war and pursue reciprocal economic benefits through trade, under an umbrella of principles embodying individual cosmopolitan rights.<sup>22</sup>

This ultra-liberal view assumes that the pursuit of individual self-interest, especially through economic exchange, is ultimately beneficial to all, so that the development of principles embodying individual rights, and the adjudication of conflicting rights-claims, would be sufficient to ensure universal consent and legitimacy. This would therefore justify even the entrenchment of internationally-agreed principles so as to override national parliamentary supremacy, to secure the 'effective judicial protection of the transnational exercise of individual rights'.<sup>23</sup> Many, even lawyers, will be sceptical of the faith this places in general liberal principles of law: democracy is far more than the rule of law. Law can at best provide a framework for adjudicating competing claims of right: political processes must decide who should have what rights. This was seen, for example, in the debates around the MAI, which was criticized on the grounds that it would grant strongly enforceable rights for corporations

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'that enables citizens in individual jurisdictions to transcend the idea that their "place" is limited by national boundaries or their own particular geography' 'A Global Perspective on Current Regulatory Reform: Rejection, Relocation, or Reinvention?' *Indiana Journal of Global Legal Studies* 2: 429-464 (1995).at p.464.

<sup>20</sup> For his discussion of networks see especially the Conclusion to volume 1, *The Rise of the Network Society* (Blackwell Publishers, Oxford, 1996), and on Europe, chapter 5 of his 3<sup>rd</sup> volume, *End of Millenium* (1998).

<sup>21</sup> Ernst-Ulrich Petersmann, 'How to Constitutionalize International Law and Foreign Policy for the Benefit of Civil Society?' *Michigan Journal of International Law* 20, 1, at 28 (1998).

<sup>22</sup> Kant, *Toward Perpetual Peace* (1795).

<sup>23</sup> Petersmann, 'How to Constitutionalize International Law', 26.



and investors without any concomitant responsibilities, and impose 'disciplines' on states without strengthening state regulatory capacity.<sup>24</sup>

Others have put forward somewhat modified, neo-Kantian models, which accept the need for a strengthening of the international institutional framework to provide an underpinning for 'cosmopolitan democratic public law'; but what seems to be envisaged does not appear very different from what I have described as the ultra-liberal model, somewhat reinforced by improving the representativeness of regional and international organizations.<sup>25</sup> There are clear contradictions and limits to the neo-Kantian models,<sup>26</sup> and a new approach should begin by more adequately taking into account the ways in which the changed nature of the state and the fragmentation of the public sphere entail new modes of accountability and hence new democratic forms at all levels.

A different, but in many ways complementary, approach is taken by some of those who do accept that the new modes of governance raise new issues of accountability. These are the political and international relations theorists who have identified the important role of regulatory networks in the regional and international spheres, but regard them as an essentially technocratic infrastructure, or a delegation of administrative powers.<sup>27</sup> From this

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<sup>24</sup> See Picciotto and Mayne (eds.), *Regulating International Business*. (1999).

<sup>25</sup> This appears to be the argument of David Held, *Democracy and the Global Order* (1995); see also D. Held, 'Cosmopolitan Democracy and the Global Order: A New Agenda' in J. Bohman and M. Lutz-Bachman (eds) *Perpetual Peace* (Cambridge, Mass., MIT Press 1997) 235-251.

<sup>26</sup> These are explored by the contributors to James Bohman and Mathias Lutz-Bachman's edited collection *Perpetual Peace* (Cambridge, Mass., MIT Press 1997), although they are generally concerned for various reasons to rescue what can be salvaged rather than look for a new approach. As the Editors of the collection point out in their Introduction, 'Escaping the dilemmas of despotism and fragmentation remains the most difficult institutional challenge of a cosmopolitan order; showing how the public use of reason permits both unity and difference is a task that the Kantian conception of reason has yet to solve' *ibid.* p. 18.

<sup>27</sup> In international relations, this is essentially a variant of régime theory: see e.g. Volker Rittberger, ed., *Régime Theory and International Relations*. (Oxford, Clarendon Press, 1993); J. Rosenau and E.-O. Czempiel, Eds., *Governance without Government* (Cambridge, CUP, 1992). A thorough treatment of supranationalism as delegated administrative or normative power, with an incisive analysis of the legitimacy problems it poses, is provided by Peter L. Lindseth, 'Democratic Legitimacy and the Administrative Character of Supranationalism: the Example of the European Community', *Columbia Law Review* 99, 628 (1999). Lindseth suggests that the entire ensemble of the supranational institutions of the EC should be characterized as 'a kind of administrative agency of the several Member States', since 'its institutional legitimacy does not flow from an en masse political mobilization, globally transferring sovereignty in a constitutional sense' (*ibid.* 659). This is perhaps somewhat circular and static: another view is that the construction of transnational institutions has also been a response to legitimation crises at the national level, a view compatible with the broader perspective with which Lindseth opens his article, that 'supranational delegation [could be viewed] as the next stage in a process of diffusion and fragmentation of normative

perspective, specialists or experts can be regarded as facilitating the normal channels of government and international relations, by dealing with detailed and essentially technical tasks, thus making it easier for the traditional democratic government structures to resolve the more general and important political issues. This approach has been theorized by Emanuel Adler and Peter Haas, who argued that the 'epistemic communities' of experts sharing a common set of values can facilitate the resolution of global policy issues by 'narrowing the range within which political bargains could be struck'. As an example, they cited the way in which the core of the Bretton Woods monetary system, fixed rates and the dollar-gold standard, was agreed by expert consensus, leaving a narrower range of issues such as the extent of balance-of-payments support, to be 'resolved through purely political muscle'.<sup>28</sup> However, the insider memoirs of Raymond Mikesell give a very different and more plausible flavour of those negotiations, showing that the 'experts' of 1943-45 were highly political individuals such as Harry White, and that key matters, such as the proposed IMF quotas, were calculated on the basis of political acceptability, although put forward as objective and scientific in order to facilitate acceptance.<sup>29</sup>

This suggests that the growth of international regulatory or governance networks does not constitute the reduction of the scope of interstate politics, but its pursuit by other means.<sup>30</sup> Certainly, this may entail an attempt to 'depoliticize' issues, by deploying scientific, managerial, or professional techniques and basing their solution on universalising discourses. However, such techniques are neither neutral in themselves, nor in the processes of their development and application. To operate effectively, they must interact with intersecting epistemologies, within a process that can also reflect wider public concerns, in order to produce generally acceptable value judgements. For example, while it is clearly desirable to ask scientists to evaluate the health risks of particular food production techniques (such as hormones to enhance the beef or milk production from cattle), the acceptability of these techniques depends also on a variety of other social and economic factors, which affect for example the likelihood of high dosages being administered on farms. In the end, it entails a social value-judgement, balancing potential health risks against productivity improvements. That specific technical issues cannot easily be isolated from wider cultural, social, and political factors is also borne out by the frequent experience of wide divergence of views and

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power that has dramatically altered the balance of power at national level over the course of the twentieth century' (ibid. p.632).

<sup>28</sup> E. Adler and P.M. Haas 'Conclusion: Epistemic Communities, World Order, and the Creation of a Reflective Research Programme' *International Organization* 46 (Special Issue on Knowledge, Power and International Policy Coordination), 367, at 378 (1992).

<sup>29</sup> R. F. Mikesell *The Bretton Woods Debates: A Memoir*. (Princeton, NJ, Princeton U.P. 1994).

<sup>30</sup> Yves Dezalay, 'Between the State, Law and the Market: The Social and Professional Stakes in the Construction and Definition of a Regulatory Arena' in W. Bratton et al. (eds) *International Regulatory Competition and Coordination* (1996) 59.

disagreements on decisions between experts or specialists from different national and cultural backgrounds.<sup>31</sup>

Thus, while there is an important role for specialist expertise in regulatory decision-making, it is important that it should be exercised within a framework that is accountable and responsive. This includes direct democratic accountability, since the powers of regulators have important social effects, even if they are narrow in scope (for example, central bankers' powers to set short-term interest rates, utility regulators' powers over pricing or service obligations, or the role of scientists in setting the allowable catch from a fishery). Much of the discussion of regulation starts from the mistaken assumptions that it is an external 'imposition' on markets, only justified in cases of 'market failure', and limited to market-facilitation rather than redistribution. These assumptions underpin the view that market-facilitative regulation can and should be guided purely by 'efficiency' considerations, and can therefore be done technocratically, since only decisions involving 'redistribution' or the allocation of scarce resources entail social value judgements and thus require political legitimation. In fact, a market economy cannot exist without norms of many kinds, from technical standards to semi-formal regulation as well as formal legal rules, and it is these norms that create and define property rights, the institutions and structures of production and distribution, and the conditions of competition.<sup>32</sup> They therefore have a major impact on livelihoods, health and living standards, and their legitimacy depends on wide social acceptability. The importance and complexity of such forms of regulation has increased in post-industrial, globalized capitalism. As Peter Strauss points out (in this volume), this has led to pressure for new forms of democratization of the accountability of formal regulatory rule-making even at national level, which accept that it is not a merely technical matter, but must be done as a process of open interaction with a wide public, and subject to checks on the exercise of private influence.

We may take as an example at this point the provisions of the EU-US Mutual Recognition Agreement, which is perhaps the centre-piece so far of transatlantic regulatory co-operation within the TEP.<sup>33</sup> The basic principles laid down in the Framework agreement require each state to accept that compliance with its technical standards or requirements will be certified by conformity assessment bodies of the other state, once they have been duly designated and in relation to agreed sectors and regulations. Thus, in principle, neither state gives up its 'sovereign' rights to decide its desired levels of regulatory protection, but merely delegates to

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<sup>31</sup> Studies show that officials in bureaucracies that are represented as technocratic (such as the European Commission) understand their role as political, and are concerned that their policies should be acceptable to the public: see e.g. C. Landfried, 'Beyond Technocratic Governance: The Case of Biotechnology.' *European Law Journal* 3, 255-272 (1997).

<sup>32</sup> David Campbell and Sol Picciotto, 'Exploring the Interaction between Law and Economics: the Limits of Formalism.' *Legal Studies* 18, 249-278 (1998).

<sup>33</sup> Agreement on mutual recognition between the European Community and the United States of America - Joint Declaration, London, 18/05/1998; *Official Journal* L 031, 04/02/1999 p.3 - 80

administrative agencies of the other the technical task of verifying conformity.<sup>34</sup> There are various procedures for consultation, information exchange, and even the possibility by agreement of joint audit/inspection in order to maintain confidence in the conformity assessment process, but they are purely on an inter-agency basis. These arrangements may prove functional for uncontroversial standards, although the lengthy period taken to establish them indicates they have not been unproblematic. However, it is unlikely that they would carry adequate legitimacy in relation to standards, however technical, which have raised significant concerns among the importing country's consumers, such as ensuring that the hormone dosage administered to cattle on farms ensures a negligible level of potentially cancer-causing residues.

### C. Deliberative or Direct Democracy

The discussion of the limits of neo-Kantian models for democratizing globalism points to the need for new concepts and forms of democratic accountability, responding to the fragmentation of the public sphere, and the more dispersed, decentralized, and multi-layered forms of regulating the exercise of social power. Indeed, this process of fragmentation both results from the limits and contradictions of previous, state-centralized forms, and also stimulates new forms of legitimation. The very decentralization of decision-making itself entails and provides opportunities for accountability, since power is less concentrated. To that extent it is accurate to see a connection between liberalization and increased liberty and even accountability. The dispersal of decision-makers provides automatic checks and balances, since a decision by one committee or regulator is rarely definitive. The much greater opportunities for strategic behaviour and regulatory arbitrage generates regulatory competition, which has the potential for ratcheting standards up as well as down. Although this tends to favour those with greater opportunities for mobility, and to destabilize and thus downgrade existing, socially-embedded regulatory arrangements and capacities, it also opens up prospects for strategic actions by new types of citizen groups and social organization.<sup>35</sup> This helps to explain the mushrooming growth of issue-oriented social movements broadly described as Non-Governmental Organizations (NGOs).

However, the constitution of democracy requires the formulation of principles, adapted to the emerging forms of the new public sphere, but which explicitly aim to structure it to ensure the most effective forms of popular participation. The dangers of liberalization and globalization are that they unleash socially destructive behaviour based on the competitive pursuit of self-interest, as existing normative and institutional restraints are undermined or dismantled. Who can be genuinely surprised when full-blooded liberalization results in widespread corruption and the rapid growth of organized crime, as has occurred for example in Russia?

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<sup>34</sup> Joan Claybrook, of Public Citizen, in a statement to the TransAtlantic Consumers Dialogue on 23 April 1999 that was generally critical of the inadequacy of public consultation on international trade issues, expressed strong reservations on the harmonization of consumer protection standards, but accepted harmonization of industrial standards and especially of testing procedures, although she did not address the issue of mutual recognition. (Statement of Joan Claybrook, [www.harmonizationalert.org/joan.htm](http://www.harmonizationalert.org/joan.htm), accessed 16/06/1999).

<sup>35</sup> For detailed analysis with many examples and practical suggestions see Braithwaite and Drahos, *Global Business Regulation* (forthcoming).

Thus, new democratic constitutional principles should foster active deliberation by citizens, based on the articulation and evaluation of generally applicable values in a variety of public forums and institutions. The most helpful and relevant approaches, in my view, emerge from the work of political theorists arguing for new forms of direct democracy based on deliberative principles, and aiming to contain or counterbalance instrumental rationality by fostering public debate and decision-making through communicative interaction and reasoning.<sup>36</sup> They attempt to respond to the challenge posed to both liberal and republican (or communitarian) democracy by social fragmentation, which generates a politics of identity and views that differences are unassimilable.<sup>37</sup>

These proposals do not reject representative government, but in fact respond to the ways in which it has been transformed. Bernard Manin has comprehensively and convincingly analysed these transformations, with the progressive breakdown of party-democracy, in which parliaments became a register of the relative force of clashing interests which governments aimed to resolve by compromises. He charts the rise of a new form of representation, in a context of greater complexity and unpredictability, in which politicians offer to an electorate which now 'appears, above all, as a public which responds to the terms that have been presented on the political stage' a choice among images which are 'highly simplified and schematic political representations'.<sup>38</sup> Opinions on specific issues are no longer pre-formed or defined by group political identities, and hence must be formulated and developed through debate in various public forums, although such debate is dominated by communications media that are perhaps less partisan, but more prone to drama and sensationalism. This again indicates the importance of ensuring that government takes place within a broader framework of debate and decision-making which is open to the active involvement of issue groups and concerned citizens. In the final section of this paper, I suggest in outline the basic principles for constituting the public sphere in the spirit of active, deliberative, democratic participation, combined with some practical suggestions indicating their particular relevance to globalization.

### III. Constitutive Principles for a Global Public Sphere

New forms of active citizenship and political action have been developing, often around the local and national impact of regional or global policies. The recognition that the public sphere has become fragmented into multiple intersecting networks and overlapping jurisdictional

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<sup>36</sup> John S. Dryzek, *Discursive Democracy*. (Cambridge, Cambridge University Press, 1990). Although this approach owes much to Jürgen Habermas, I think it can avoid his unhelpful separation between the 'lifeworld' and that of technical and instrumental rationality, and the need to establish ideal, uncoerced communicative contexts. The social structures of power, including communication, should be seen in a more dialectical way, and the changes in the structure of the public sphere open up possibilities, many of which Habermas himself recognises, for reconstituting a more effective democracy, which in turn can counteract inequalities of power.

<sup>37</sup> Seyla Benhabib (ed.), *Democracy and Difference. Contesting the Boundaries of the Political*. (Princeton, NJ, Princeton University Press, 1996).

<sup>38</sup> Bernard Manin, 'The Metamorphoses of Representative Government.' *Economy & Society* (1994) 23, 133-171, at 160, 163.

spheres emphasises the importance of building democratic participation through new political principles, institutions and practices. These should recognise the diversity of political sites in which public policies are developed and implemented, also involving processes of interaction between these sites.

Such principles must attempt to transcend the two main traditional constitutional models, which are increasingly proving inadequate for the contemporary phase of globalization. On the one hand liberal conceptions, based on a view of society as composed of individuals pursuing their self-interest, see the role of the polity as complementing the market, and as aiming to identify the optimal collective interest either by authoritarian means (Hobbes), or via majoritarian representative democracy (Locke). Post-industrial capitalism, with its integrated global production and marketing networks, raises a wide range of social, environmental and moral issues, which cannot adequately be resolved by aggregating private interests, using either authoritarian or democratic methods. The alternative model of civic republicanism rejects the narrow view of citizenship based on weighing and balancing competing individual interests. However, its stress on an ethical politics based on visions of the common good implies a communitarianism requiring shared values, which in today's culturally fractured world takes reactionary forms, and may generate conflict rather than consensus.

As Jürgen Habermas has suggested, whereas both these views tend to see the state as the centre, deliberative politics can be adapted to a decentered society.

‘This concept of democracy no longer needs to operate with the notion of a social whole centered in the state and imagined as a goal-oriented subject writ large. Just as little does it represent the whole in a system of constitutional norms mechanically regulating the interplay of powers and interests in accordance with the market model’.<sup>39</sup>

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<sup>39</sup> J. Habermas, ‘Three Normative Models of Democracy.’ In S. Benhabib (ed.), *Democracy and Difference. Contesting the Boundaries of the Political*. (Cambridge, CUP, 1996) 21-30, at p. 27. Habermas nevertheless argues that his own concept of a ‘politically socialising communicative context’ can be translated from the nation-state to the European sphere, which entails building ‘a European-wide, integrated public sphere ... in the ambit of a common political culture’ (Habermas, J., ‘Remarks on Dieter Grimm’s “Does Europe Need a Constitution?”’ *European Law Journal* 1, 303 (1995), at p. 306). Others have put forward neo-republican models for a ‘multi-level’ European citizenship (usefully summarised in R. Bellamy and A. Warleigh, ‘From an Ethics of Integration to an Ethics of Participation: Citizenship and the Future of the European Union.’ *Millennium* 27, 447-470 (1998)), which imply that the republican version of participatory democracy can be translated to the European level (although this is contested by Habermas). However, it seems to me important to accept that even Europe, which has a strong institutional base and some elements of a common political culture, does not form an integrated political unit, and hence that democratic forms need significant adaptation. It is clear, for example, that the European Parliament must play a different role from that of national parliaments, and hence it must be differently organized, just as national parliaments must adapt to deal with the Europeanization of the legislative process. This is perhaps the practical political response to the debate about the ‘European demos’, usefully summarized and evaluated by Lindseth, ‘Democratic Legitimacy and the Administrative Character of Supranationalism’, 675-683.

Others also have stressed the attractiveness of a direct, deliberative form of participatory democracy for solving problems in ways unavailable to representative systems:

'collective decisions are made through public deliberation in arenas open to citizens who use public services, or who are otherwise regulated by public decisions. But in deciding, those citizens must examine their own choices in the light of the relevant deliberations and experiences of others facing similar problems in comparable jurisdictions or subdivisions of government.'<sup>40</sup>

In this perspective, decision-making, especially by public bodies, should result as far as possible from active democratic participation based on discursive or deliberative rather than instrumental reasoning. Instead of the pursuit of individual interests based on the assumption of fixed preferences, the aim is to go beyond an objectivist rationality (in which choices are considered to be made by reference to absolute and objective standards), without falling into the trap of relativism.<sup>41</sup> Thus, while accepting that there is no single objective standard of truth, since perspectives are always subjective (and hence epistemology is to that extent relativist), truth can be said to be an emergent property of the deliberative interaction between perspectives (and hence its ontology is objective).

Deliberative democracy accepts the existence of a diversity of perspectives, and aims to facilitate interactive deliberation about values through which preferences may change, or may be accommodated to each other. An emphasis on process may help to overcome the weaknesses of this model if conceived as a political ideal, or as relying on the generation of consensus purely through the public use of reason. Account must also be taken of inequalities of power, which generate conflicting interests as well as imbalances in the capacity to participate in a politics based on reasoning.

To this end, constitutional principles should aim as far as possible to protect the public sphere from the instrumental pursuit of private interests. Clearly, subjectivity resulting from each person's experiences, background and aspirations are inevitable, but this should be reflexively acknowledged so that individuals and groups maintain openness to the arguments of others. Above all, public arenas should be insulated from undue influence from private interests, and debate should be conducted in terms of explicitly articulated values and aims. This objective is fundamental to the four general principles which I would put forward as constitutive of a

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<sup>40</sup> J. Cohen and C. Sabel 'Directly-Deliberative Polyarchy.' *European Law Journal* 3(4): 313-342 (1997), at 313-4. Oliver Gerstenberg introduces the work of Cohen and Sabel into the debate on democracy in the EU by pointing out how this vision opens up the argument that supranationalism can itself be the focus of this type of radical democracy, since it goes beyond existing forms of constitutional democracy bounded by market-state-civil society, and showing that new forms of governance based on deliberative coordination are not conventionally public or private, pointing to a new division of labour between political agencies and directly-deliberative problem-solving units: Gerstenberg, 'Law's Polyarchy: A Comment on Cohen and Sabel.' *European Law Journal* 3: 343-358 (1997). See also C. Joerges and J. Neyer, 'From Intergovernmental Bargaining to Deliberative Political Processes: the Constitutionalisation of Comitology.' *European Law Journal* 3: 273-299 (1997).

<sup>41</sup> John S. Dryzek, *Discursive Democracy*. (Cambridge, Cambridge University Press, 1990).

direct-democratic, deliberative public sphere: Transparency, Accountability, Responsibility, and Empowerment. I will briefly discuss each of these in turn, although in practice they are interdependent.

#### A. Transparency

Economic liberalization and globalization have led to the increasing articulation of the requirement of transparency, but it has until recently generally been directed at national governments, aiming to reduce bureaucratic obstacles to market transactions. Thus, many provisions in the WTO agreements require transparency of national regulatory and administrative procedures. This is because it is considered that regulatory measures, policies and proposals adopted by one state may, in the context of increased global economic integration, act as obstacles to market access by firms in other states. Thus, the WTO agreements include obligations not only for accessible publication of national regulations, but also for the establishment of national contact points to provide information (including translations of relevant texts), and even for prior notification of proposals for non-standard regulations with an opportunity to make comments.<sup>42</sup> In the context of EU-US relations, it has now been recognized that transparency is the 'bedrock' for preventing conflicts and facilitating problem resolution, for both economic and political issues.<sup>43</sup>

However, there are virtually no formal provisions regarding transparency of international bodies and arenas. Indeed, intergovernmental negotiations and activities are especially opaque, and both politicians and officials generally stress the importance of confidentiality in this realm, which is often excluded from national freedom of information requirements. In the EU, it was only as a result of the legitimacy crisis which began to be recognized in the negotiation of the Maastricht treaty that principles of transparency have begun to be adopted for EU institutions.<sup>44</sup> This was finally formally recognized in the Treaty of Amsterdam signed

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<sup>42</sup> Notably, article 7 and Annex B of the Agreement on Sanitary and Phytosanitary Measures (SPS) requires states to notify in advance any proposals for regulations which are not based on an international standard, to 'allow reasonable time for other Members to make comments in writing, discuss these comments upon request, and take the comments and the results of the discussions into account'; developed countries must provide translations of documents in English, French or Spanish. The agreement on Technical Barriers to Trade (TBT), which requires states to base their technical regulations on international standards where they exist except where they would be 'an ineffective or inappropriate means for the fulfilment of the legitimate objectives pursued', focuses on transparency of conformity assessment procedures (article 10), including the requirement for inquiry points which can provide documents at reasonable cost (and for developed countries, in English, French or Spanish). The TRIPS agreement (article 63) also includes obligations to publish and notify laws, regulations final judicial rulings and administrative rulings of general application.

<sup>43</sup> *EU-US Early Warning and Problem Prevention: Principles and Mechanisms*, adopted at Bonn 21 June 1999.

<sup>44</sup> The Final Act of the Treaty on European Union signed at Maastricht on 7 February 1992 included Declaration No. 17, stating that 'transparency of the decision-making process strengthens the democratic nature of the institutions and the public's confidence in the administration', and recommending that the Commission submit a report to the Council by



in June 1997, and article 255 of the consolidated Treaty establishing the European Community now gives any EU citizen or resident a right of access to documents of the Council, Commission and Parliament, subject to 'general principles and limits on grounds of public or private interest', to be drawn up by the Council.

This is an exceptional, perhaps even unique, provision in an international treaty, but should be regarded as a constitutive principle for all international bodies, and indeed any serious international regulatory activity. Nevertheless, such a principle will inevitably remain ineffective if subject to broad exceptions, and if both the general rules and individual decisions on what can be revealed are left to each body to decide for itself.<sup>45</sup> Effectiveness could perhaps be improved by the establishment of Ombudsmen, as has also been done in the EU,<sup>46</sup> to monitor the transparency of international bodies, and to investigate or adjudicate claims of confidentiality. The principle of transparency is just as important for apparently technical bodies, as has been pointed out by Willem Buiter in a trenchant critique of the traditionalist approach adopted by the European Central Bank, which he describes as 'typical of a central banking tradition that was, until recently, dominant across the world, which views

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1993 on measures to improve public access to information. This resulted in the approval by the Council and Commission on 6 December 1993 of a Code of Conduct, which stated the general principle that 'the public will have the widest possible access to documents held by the Commission and the Council', but which also required the institutions to refuse access to any document whose disclosure would undermine 'the protection of the public interest (public security, international relations, monetary stability, court proceedings and investigations)', and permitted them to refuse access 'in order to protect the institution's interest in the confidentiality of its proceedings'. Journalists, MEPs and activists have waged several battles to try to ensure these exclusions are interpreted strictly, with some support from the ECJ: see Tony Bunyan, *Secrecy, Democracy and the Third Pillar* (London, Kogan Page, 1999), and *Heidi Hautala v. Council of the EU*, Case T-14/98, Judgment of Court of First Instance, 19 July 1999. Typically, this case concerned the Council's refusal to supply a report on the criteria for arms exports, on the grounds that disclosure could be harmful for the EU's relations with third countries, and although the Court annulled the decision it did so only because the Council had not considered whether the report could be published with sensitive parts removed.

<sup>45</sup> Thus, the initial proposals emerging from discussions of officials of EU institutions for implementation of article 255 (Discussion paper on public access to Commission documents, 23 April 1999, SG.C2/VJ/CDD(99)83) apparently suggested that only documents concerning legislative measures would be regarded as 'accessible', while internal 'working documents' would be 'non-accessible', and even the former might be embargoed until after the formal adoption of the decision: see *Statewatch* vol. 9 no. 2, March-April 1999. Such a proposal is hardly likely to gain approval, but that it was made at all is revealing of the official perspective.

<sup>46</sup> C. Grønbeck-Jensen provides an interesting evaluation from a Scandinavian perspective, particularly apposite since these countries have been influential in the moves towards transparency in the EU; but he points out that the EU Ombudsman has no real teeth, having no better access to documents than the citizen: 'The Scandinavian tradition of open government and the European Union: problems of compatibility?' *Journal of European Public Policy* 5: 185-99 (1998).

central banking as a sacred, quasi-mystical vocation, a cult whose priests perform the holy sacraments far from the prying eyes of the non-initiates.<sup>47</sup>

Transparency has now been greatly facilitated by the opportunities opened up by the Internet. Indeed, some international bodies have begun to make extensive use of this medium to make their documentation available. It is obviously very advantageous for an organisation such as the WTO to be able to give such instant online access to its large and growing documents archive to all those in its 132 member countries who require it. The internet also offers possibilities for much more interactive consultation of relevant communities and the public, discussed by Peter Strauss in this volume, and some organizations are beginning to make use of this. In practice, however, there are very great inequalities in the capacity to access the Internet;<sup>48</sup> so that to realise the opportunities it offers also requires active programmes to broaden effective participation by all affected and concerned citizens.

Finally, perhaps the key requirement is to develop and sustain information media which can help to provide the kind of forum that active public participation in deliberative debate requires. That everywhere the public's distrust of politicians is equalled only by its cynicism about journalists is a serious indictment of our political systems. There are certainly some media organizations in some countries, as well as many able and committed individuals, dedicated to providing a rich context of information and facilitating debate. However, the media overall, in some countries more than others, are subservient to government agendas and commercial imperatives,<sup>49</sup> and hence tend to reflect received or élite opinion. Thus, a key requirement for transparency in the public sphere is to ensure guarantees of media independence from both government and private dominance.

## B. Accountability

The past few years have seen increasing concern and debate about the accountability of all kinds of participants in public policy debates. Even in countries with apparently well-established systems of representative democracy, politicians have been subjected to new scrutiny over their acceptance of bribes, political donations or campaign financing, as well as debates about the relationship of their personal lives and morality to their public functions. That such issues have been very widespread, not confined to countries undergoing identifiable political transitions (such as Italy, with its 'tangentopoli' scandals linked to the collapse of the Christian Democracy-Communist duopoly), shows that they are symptomatic of generalized changes in the role of elected politicians, indicated in Bernard Manin's analysis of the changing nature of representative democracy discussed above. The increased diversity and complexity of policy issues, and the decline of mass-party politics, places new responsibilities on politicians to develop specialist expertise and resources, and to manage

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<sup>47</sup> W. H. Buiter, 'Alice in Euroland.' *Journal of Common Market Studies* 37: 181-209 (1999).

<sup>48</sup> Saskia Sassen, 'Digital Networks and Power', in Mike Featherstone and Scott Lash, *Spaces of Culture*, (Sage Publications, London, 1999) 49-63; 'Access to the Network Society - Who is in the Loop and on the Map?', in United Nations *Human Development Report* (UN, New York, 1999) 61-66.

<sup>49</sup> See, e.g., the papers in the special issue of *Journal of International Affairs* vol. 47 no. 1 (1993), 'The Power of the Media in the Global System'.

their information sources scrupulously. They themselves are also increasingly concerned with their responsiveness to public opinion, whether expressed in their postbags (and e-mails), opinion polls, or focus groups. However, the increased importance of personal charisma or 'name recognition' for the standing of politicians, as opposed to policy or principles, has undermined their legitimacy as political representatives.

For a variety of reasons it has become increasingly plain that democratic accountability of public bodies cannot rest only on their accountability via parliaments and elected politicians. Indeed, some kinds of decisions (such as control over interest rates) have been transferred out of the political domain to protect them from 'short-run' electoral considerations. An increasingly wide range of matters have been delegated to specialist bodies operating under defined mandates, with powers either of recommendation or of actual decision. Where there is a governmental input, it is generally made by non-elected officials, who are subject to only superficial supervision by a succession of partially-briefed elected politicians. Often, issues are not resolved by a decision from one particular body, but subject to interacting decision-making powers of various bodies, even at national level, and even more so globally. Thus, the development and use of biotechnology depends on decisions by patent offices, scientific and ethical committees, food and drug regulators, national governments, and perhaps ultimately WTO dispute-settlement procedures. It is important not only that all such public bodies operate under explicit and specific accountability mandates, but also that their decisions are taken in a context of well-informed debate involving as broad a range of the public as possible. The channels of accountability are now less vertical, leading into central government, and more horizontal, entailing interaction between various local, national, regional, and international public arenas.

Thus, while elected politicians certainly should play an important and perhaps determinant part, ensuring accountability within the public sphere entails the involvement of a wide range of entities and groups, all of which have their own constituencies and accountability mechanisms. This is perhaps the reason for the increased use in recent years of the somewhat amorphous term 'civil society'. The point here is that there is no single accountability mechanism to the broad public. Participants in public debate can make different contributions, but it is incumbent on each of them to clarify to whom and how they are accountable. Indeed, there have been increasing pressures for all kinds of organizations to improve their accountability, not only to their direct members but to a wider constituency of stakeholders.

Corporations have come under pressure to be responsive to the needs and demands of their customers, suppliers, workers, and contractors, as well as local communities and the wider society in respect of some of their activities. Their traditional focus on the 'bottom line' of direct costs and revenues to generate shareholder value has now been overtaken by the need for a more continuous two-way dialogue with this wider constituency, and concern for the 'triple bottom line' and long-term values such as reputation. No doubt many business managers need to be convinced that this entails more than just improved communication of decisions made in their boardrooms; but it is no coincidence that the lead is being taken by companies that have been hit by unexpected public reactions to policies which they believed had the legitimacy of approval by all relevant regulatory bodies. This has been shown, for example, by Shell's experiences over the Brent Spar oil platform disposal and the impact of its oilfields on local communities in eastern Nigeria, and those of biotechnology companies in relation to genetically modified organisms. The damage to investor confidence in the

biotechnology sector should bring home to all concerned the importance of improving public confidence in regulatory decisions.

In reply, many have challenged the various campaigning organizations or NGOs to justify their claims to represent public opinion. Such organizations cover a wide gamut, and clearly do have a responsibility to clarify for whom they speak, as well as to maintain an active dialogue with their members and stakeholders. They are vulnerable to 'bottom-line' pressures from their sources of funding, which may lead them to adopt high-profile campaigns or maintain positions for their attractiveness to the media rather than their intrinsic validity. There may be differences of perspective between different elements of their constituencies, for example subscribers and contributors in developed countries and those in less developed countries who are the intended beneficiaries of development organizations. Interest-group institutions, such as business and trade associations and trade union organizations, in principle represent their members, and can claim accountability ultimately via election; but, certainly at the international level, this may be a distant link. There is much they could do to improve the active involvement of their grass-roots memberships.

In summary, the roles of various kinds of participants should be defined according to the contribution they can make to public debate based on generally applicable values. Procedures for consultation and involvement in decision-making should reflect their particular roles, as well as accommodating and safeguarding against possible distortions resulting from advancement of private interests.

### C. Responsibility

Participants in public deliberation may also be said to have obligations of responsibility, which are distinct from their accountability to their particular constituencies.<sup>50</sup> These include principles for maintaining a separation between involvement with private interests and the conduct of public duties and activities, as well as norms and practices of responsible behaviour developed by and for particular groups and professions. The acceptability and effectiveness of public policy decisions increasingly depend on the quality of the reasons supporting them, which in turn requires all those involved in debates to uphold high standards of probity. This is evidenced by the increased attention being given to ethical standards by and for a wide range of groups and professions, many of which have been formally articulated in codes or even in law.

An important aspect of this is to define and police the line between professional or public responsibilities and obligations to a commercial client or employer. Thus, banks and financial intermediaries are now obliged to report suspicious transactions under money-laundering legislation, enacted nationally but stimulated and monitored by the international regulatory network centred on the Financial Action Task Force.<sup>51</sup> External auditors may have specific

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<sup>50</sup> This of course depends on who is included in that constituency: for example, it is argued that potential conflicts between corporations' duties to their shareholders and to their stakeholders should be avoided by limiting their accountability to shareholders, while accepting that they have broader social responsibilities. I prefer here to use the term responsibility in relation to how debate should be conducted.

<sup>51</sup> A typical informal global regulatory body, set up by a decision of the Group of 7, but located at the OECD in Paris: see <http://www.fatf.org>.

responsibilities to report to regulatory authorities, for example to banking supervisors, if they uncover breaches of regulatory requirements. Officials or civil servants may be protected from disciplinary or even legal proceedings for breaches of confidence if they can show that they acted in the public interest. However, too often the formal rules on these matters are not designed to encourage or protect disclosures in the public interest, but rather to protect public or private bureaucracies from undesirable obligations or revelations. Their strengthening should be regarded as a significant contribution towards the democratization of global governance.

More broadly, all those involved as information gatekeepers or knowledge producers, now more than ever, need to operate reflexively, and with an awareness of how their professional or scientific practices and contributions impact on the quality of public debate. These matters are not uncontroversial, as can be seen for example in the debates in the UK about the scientific evaluation of the potential dangers from genetically modified organisms.

#### D. Empowerment

My final principle should be regarded as an overriding one, for without it the other proposals for strengthening the public sphere as a deliberative arena would do little more than provide an alibi for the maintenance and extension of the system of élite decision-making. It is all too easy for those with decision-making power to pay lip-service to the need for public consultation or participation, although one can still be surprised at the frequency with which they neglect even this bare minimum. It is often only as a result of a policy setback, such as the breakdown of the MAI negotiations or the failure to obtain 'fast-track' authority, that those in power resort to a 'charm offensive' to try to win support from potential critics. Frequently, also, they prefer to distinguish carefully between procedures for consultation with public interest or activist groups, and their discussions with business or corporate interests. Indeed, this type of separation has been institutionalized in the TEP, which began life largely as an attempt to respond more directly to the needs of big business, and only subsequently added a Transatlantic Consumer Dialogue to the Transatlantic Business Dialogue.<sup>52</sup> This inevitably raises suspicions that decision-makers are more open to influence from private interest groups, and that they regard consultation with public interest-groups and concerned citizens (or even legislators) as an irritating time-waster, perhaps necessary to forestall subsequent criticism. It is all too rare to find an acknowledgment that the quality of public decisions can be improved if they take place in a context of full participation by all concerned and affected groups.

The challenge, therefore, is to find ways to ensure effective participation in debate and decision-making especially of disadvantaged citizens and groups. Much of the political opposition to and disaffection with globalization and liberalization results from the unleashing of forces which exacerbate inequalities within and between states. This is often portrayed as a battle between the global market and the national state, a view which tends to neglect the ways in which the transformation of the world market is being brought about by complex processes of international re-regulation. To take a key example, the restructuring of

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<sup>52</sup> Maria Green Cowles, 'The Transatlantic Business Dialogue: The Private Face of Transatlantic Relations' in Eric Philippart and Pascaline Winand (eds), *Policy-Making in US-EU Relations: the New Transatlantic Agenda Revisited* (Manchester, Manchester University Press, forthcoming).

global telecommunications, in which giant firms battle for market shares, entails struggles over technical standards, sectoral regulation (notably governing interconnection rights and charges) and competition rules, through interactions between a variety of national and international bodies. A key issue, which has for several years been preoccupying the International Telecommunications Union (ITU), is the system of settlements in respect of international calls, which entails revenue-sharing resulting in transfers mainly from developed to developing countries estimated at \$7-10 billion per year.<sup>53</sup> There is considerable pressure to reform this system, to end discrimination in charges between international and national calls, in line with the liberalization of telecommunications services negotiated bilaterally, regionally (especially in the EU) and through the WTO. Yet it is also widely recognized that a truly global telecommunications system is unattainable unless equivalent (or better) means are found to finance the expansion and upgrading of telecommunications networks in developing countries.<sup>54</sup>

This clearly shows that global battles over regulation also concern revenue distribution and redistribution, not just 'neutral' rules allowing markets to operate 'freely'. Many other debates and battles over international regulatory arrangements also have (re)distributional consequences or implications, running often to many millions or billions of dollars, such as competition laws and policies, environmental protection schemes, intellectual property rights, food safety requirements, agricultural support and rural development measures, prudential rules for financial institutions, and international tax arrangements. Too often the talk of 'market friendly' regulation implies rules that favour the economically powerful, whereas balanced and sustainable long-term economic growth may require measures to protect, encourage and stimulate less developed or disadvantaged groups, regions and countries.

An important function of direct democracy is to open up the received wisdom of closed bureaucratic or technocratic decision-makers to critical and destabilizing ideas. This perhaps cannot be institutionalized without blunting the critical edge of political protest, although sometimes well-considered and substantiated arguments take second place to spectacular actions designed to attract media attention. Responsive and confident political systems can find ways to make themselves more open to external critical input. This can include, for example, public forums or commissions with powers to conduct inquiries into policies or issues, or citizen juries to which specific decisions could be delegated, based on systematic presentation and examination of evidence.

It is hard not to close an essay of this kind without some stirring rhetoric about the importance of this matter for the future of the planet in the new millennium. Major issues are certainly at stake, but their scope and complexity are hard to grasp in the round. Globalization seems to produce scandals, panics and crashes, which we can hope will remain episodic events. However, not only systemic stability is at stake in the construction of global

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<sup>53</sup> Dr. Henry Chasia, ITU Deputy Secretary-General, Opening Remarks to the Annual Council of the Commonwealth Telecommunication Organization, Trinidad & Tobago, September 29th 1998; this and much other documentation on the issue is available in the special area of the ITU website, [www.itu.int](http://www.itu.int).

<sup>54</sup> See the comprehensive report by Michael Tyler, *Transforming Economic Relationships in International Telecommunications* (1998) for ITU Regulatory Colloquium No. 7, on The Changing Role of Government in an Era of Telecommunications Deregulation.

governance, but our ability to establish the conditions for economic activity finally to respond to the needs of the world's poor and dispossessed for dignity and social justice.